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Issue Date: 31 December 2003

Case No. 2002-LHC-2532

OWCP No. 10-35050

In the Matter of

STEPHEN COX,
Claimant,
v.

McDONNELL DOUGLAS/BOEING,
Employer,

FREEMONT COMPENSATION INSURANCE GROUP,
Carrier, *Insolvent*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party In Interest

Appearances:
Robert T. Newman, Esq., for Claimant
Daniel F. Valenzuela, Esq., for Employer
Karen L. Mansfield, Esq., for Director

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER GRANTING SECTION 8(f) RELIEF

This proceeding involves a claim for disability from an injury suffered by Claimant, Stephen Cox, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*. (hereinafter referred to as the "Act"), as extended by the Defense Base Act, 42 U.S.C. § 1651 *et seq*. (hereinafter "DBA"). The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was originally scheduled for March 12, 2003, pursuant to a notice of hearing issued on November 6, 2002. By letter dated February 12, 2003, counsel for Employer advised that an additional day would be needed for trial. The formal hearing was rescheduled and held on

March 13-14, 2003, in Atlanta, Georgia, pursuant to a second notice of hearing issued on February 21, 2003. (Tr. at 1, 197).[1]

Prior to the rescheduling of the formal hearing, by motion filed January 13, 2003, counsel for Director, Office of Workers' Compensation Programs ("Director"), sought dismissal of Employer's application for relief under § 8(f) of the Act, citing two grounds for dismissal. Director first argued that Employer's application was not timely filed. Second, Director argued that the application was incomplete pursuant to the requirements found at 20 C.F.R. § 702.321. Employer filed a response to Director's motion on January 30, 2003, arguing that its application was both timely and complete under the regulations.

An order was issued on February 10, 2003, denying Director's motion to dismiss, finding that the application was timely filed within the extension of time requested by Employer and granted by the District Director. The order further found that Director's argument that the application was incomplete went to the merits of the application itself, and that Director's motion was actually one for summary decision. Because genuine issues of material fact remained to be resolved, the motion to dismiss was denied on this ground as well. The hearing went forward as scheduled.

At the conclusion of the formal hearing on March 14, 2003, the record was held open for thirty days for the submission of Employer Exhibits 24, 25, and 26[2], for Employer to respond to Claimant's Exhibits 30 and 32, for the submission of Claimant's Exhibit 39, and an additional thirty days for submission of post-hearing briefs. (Tr. at 242-44). Employer submitted its Exhibit 26, a copy of its § 8(f) application, on March 24, 2003. By motion, the Director requested an extension of time to file post-hearing briefs. No objections were made, and by order issued May 19, 2003, an extension of time for submitting briefs was granted, permitting the parties until the close of business on July 3, 2003, to submit post-hearing briefs. Employer submitted its Brief on July 3, 2003. Director submitted his Brief on July 3, 2003.

By letter dated May 29, 2003, Counsel for Claimant advised that Claimant and Employer had resolved all disputed issues regarding compensation and attorney fees. Counsel submitted executed stipulations of facts between Claimant and Employer along with a petition for attorney fees and expenses. The parties requested issuance of a compensation order pending briefing and resolution of the sole remaining issue, Employer's request for relief under § 8(f) of the Act. Upon review of the stipulations and evidence admitted at the formal hearing, I found that the stipulations of fact were supported by substantial evidence and that they did not violate § 15(b) of the Act.[3] Therefore, the stipulations were accepted as resolving all issues in dispute regarding compensation and attorney fees. On June 17, 2003, a Decision and Order was issued, awarding Claimant permanent partial disability compensation commencing on February 7, 1997, based upon the stipulations of facts submitted on May 29, 2003.[4]

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[1] The following abbreviations will be used: "EX" shall denote Employer's exhibits, and "Tr." shall denote the transcript.

[2] Employer Exhibit 26 is a copy of Employer's Application for Relief Under Section 8(f). Employer did not provide a copy of the application to the administrative law judge during the hearing, and so was instructed to do so within the period of time that the record was left open following the hearing.

[3] The stipulations are incorporated by reference into this decision and order.

[4] Claimant was also awarded temporary total disability from August 15, 1995, until July 29, 1996, and

On June 30, 2003, Counsel for Claimant submitted a motion for reconsideration, requesting clarification regarding the medical bills of Dr. Marc Isralsky. Employer did not oppose the request for reconsideration. Claimant's motion for reconsideration was granted, and a Decision and Order on Reconsideration was issued on July 2, 2003. The July 2, 2003, decision and order repeated the original decision in its entirety, and inserted additional language as requested by Claimant.

By post-hearing motion, on July 31, 2003, Claimant requested that, if relief was granted under § 8(f), any monies that would otherwise be returned to the Carrier be held in trust by the Department of Labor Special Fund until such time as those sums are needed to pay for Claimant's future medical expenses. Claimant argued that Carrier has been declared insolvent as of July 1, 2003, by the insurance commissioner of California and was being liquidated. Claimant stated that he was concerned that the liquidation process may delay or even preclude payment of monies that would be designated for his future medical expenses. (Claim. Post-Hr'g Mot., at 1). Claimant further argued that "the California Insurance Guaranty Fund has in some past cases declined to pay Longshore claimants." (Claim. Post-Hr'g Mot., at 2). On December 23, 2003, Counsel for Employer advised by letter that "because of the liquidation of Fremont, Boeing has voluntarily agreed to accept liability. . . Given Boeing's assumption of liability, the trust fund is not necessary." In light of Employer's response, no ruling will be made on Claimant's post-hearing motion, as it is moot.[5]

The findings and conclusions that follow are based on a complete review of the record in light of the stipulations of fact and the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUE

The sole issue to be resolved is whether the Employer is entitled to Special Fund relief under § 8(f) of the Act.

DISCUSSION

Jurisdiction

Initially, the proper applicable law must be determined. This is particularly true in this case because the sole issue is a request for relief under §8(f), and because there are significant splits of authority among the Circuits, and because the case falls under the Defense Base Act ("DBA"), which is an extension act of the Longshore and Harbor Workers' Compensation Act. 42 U.S.C. § 1653(b) (2002). Typically a petition for review of a compensation order in a

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from October 22, 1996, to February 6, 1997, (a total of 65 2/7 weeks), at the maximum compensation rate of $760.89 per week. (ALJ Dec. & Order on Recons., July 2, 2003, at 4).

[5] It is also noted that the insolvency of the insurance carrier has no bearing on the liability of the Employer. Employer is always ultimately the party responsible for payment of compensation. Therefore, Claimant's motion was moot unless the Employer was also insolvent.

Longshore matter lies in the judicial circuit in which the injury occurred. 33 U.S.C. § 921(c) (2002). However, this case arises under the DBA, which provides that:

> Judicial proceedings under Sections 18 and 21 of the Longshore and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this chapter shall be instituted in the United States District Court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved

Id.

A split has arisen among the circuits as to which is the proper court for an appeal of a DBA case. One group of circuits, including the Fourth and Sixth Circuits, holds that the appeal lies in the appropriate district court, as stated in Section 3 of the DBA [42 U.S.C. § 1653]. *See Lee v. Boeing Co.*, 123 F.3d 801, 805 (4th Cir. 1997) (holding that the DBA "clearly and unambiguously provides that a party adversely affected by the administrative resolution of a DBA claim must file a petition for review in the United States district court where the office of the appropriate deputy commissioner is located"); *Home Indem. Co. v. Stillwell*, 597 F.2d 87, 89 (6th Cir. 1979) (finding that the DBA is unambiguous as to judicial review of a compensation order under DBA, and that the review is properly conducted in the United States district court where the deputy commissioner's office is located); *see also Hice v. Director, OWCP*, 156 F.3d 214, 218 (D.C. Cir. 1998); *ITT Base Servs. v. Hickson*, 155 F.3d 1272, 1275 (11th Cir. 1998); *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 1116 (5th Cir. 1991). In reaching its conclusion in *Lee v. Boeing Co*., the Fourth Circuit concluded that, because the District Director who issued the compensation order was located in Baltimore, Maryland, "judicial review of the [Benefits Review] Board's order had to begin in the United States District Court for the District of Maryland." *Lee*, 123 F.3d at 805.

Conversely, the Ninth Circuit has concluded that Congress inadvertently failed to incorporate the changes of the Longshore and Harbor Workers' Compensation Act, as amended in 1972, into the DBA, and therefore, the normal Longshore rule for review of compensation orders as found in Section 921(c) of the Act should apply, with a slight modification. The Ninth Circuit Court of Appeals held in *Pearce v. Director, OWCP*, 603 F.2d 763 (9th Cir. 1979), that Congress intended for the DBA to be a statute of "general reference," and thus, that the DBA "expressly incorporated later enacted amendments" of the Longshore Act, including those of 1972. *Id*. at 767, 769. Because Section 1(a) of the DBA, found at 42 U.S.C. § 1651(a), states that the Longshore Act applies "except as herein modified," the court reasoned, the Longshore Act and all of its provisions apply pursuant to the DBA unless the language of the Longshore Act would be inoperable; then, the language of the DBA would apply. *Pearce*, 603 F.2d at 770.

More specifically, the Ninth Circuit focused on the language of Section 921(c), which, as stated above, directs that appeals from the Benefits Review Board of compensation orders issued pursuant to the Longshore Act properly lie with the circuit court "in which the injury occurred." The problem with this provision, the court noted, was that "injuries covered by the [DBA] would almost never occur within a judicial district." *Id*. The court reasoned that the phrase "of the judicial district wherein is located the office of the deputy commissioner whose compensation

order is involved," found in Section 3(b) of the DBA [42 U.S.C. § 1653(b)], modified the Longshoreman's Act since the language of the Longshore Act "limiting jurisdiction to the court of the district where the injury occurred could not apply." *Id*. The court concluded that

> [T]he Defense Base Act does not confer jurisdiction upon the district court, but merely recognizes the jurisdiction conferred by the Longshoremen's Act, and limits that jurisdiction to the court of the district where the official who originally decided the case, the deputy commissioner, has his office.

Id. The court concluded that the Seventh Circuit Court of Appeals was where the appeal would properly lie, because the District Director's office was in Chicago, Illinois. *Id.* at 765, 771. The Ninth Circuit transferred the case to the Seventh Circuit, which approved the Ninth Circuit's holding. *Id*. at 771; *Pearce v. Director, OWCP*, 647 F.2d 716, 720 (7th Cir. 1981).

The Ninth Circuit took its analysis in *Pearce* one step further, finding that "the substitution of an administrative law judge for the deputy commissioner, when there is a hearing, makes [no] difference" when applying their rationale. *Pearce*, 603 F.2d at 770-71. The court found instead that "[t]he language . . . should now be treated as reading 'wherein is located the office of the deputy commissioner or the administrative law judge whose compensation order is involved.'" *Id*. at 771.

The Court of Appeals for the District of Columbia Circuit, which has adopted the rationale of the Fourth and Sixth Circuits, expressly rejected this additional step taken by the Ninth Circuit. In *Hice v. Director, OWCP*, 156 F.3d 214 (D.C. Cir. 1998), the court refused to expand the term "deputy commissioner" to include administrative law judges. The court reasoned that expanding the term to include the ALJs would mean that "jurisdiction travels with the ALJ who happens to hear a particular claim [and this] would add even more variability and uncertainty to the confusion surrounding judicial review under the Defense Base Act."[6] *Id*. at 218. The Fourth Circuit did not directly address the Ninth Circuit's assertion that "deputy commissioner" should include the administrative law judge, but did expressly state that the proper court was located in the district in which the District Director's office was located, which in that case was Baltimore, Maryland.

Courts on both sides of the split agree that the location of an appeal is in the "judicial district wherein is located the office of the deputy commissioner whose compensation order is involved." The split, then, is as to the particular court where the appeal should lie. The District Director assigned to the instant matter is located in Chicago, Illinois, part of the Seventh Circuit. The Fourth Circuit rationale would place the appeal in the United States District Court for the Northern District of Illinois. If the Ninth Circuit rationale is applied, the proper appeal could lie either with the Seventh Circuit Court of Appeals (where the District Director is located) *or* in the Fourth Circuit (since the undersigned administrative law judge has his office in Virginia). The Ninth Circuit in *Pearce* does not express a preference for either the circuit in which the District

[6] In *Hice*, the administrative law judge who decided the case had his office in Washington, D.C., while the District Director to whom the case was assigned was located in Baltimore, Maryland. *Hice*, 156 F.3d at 215-16. Following the Fourth Circuit, the court held that the proper forum for the appeal was the United States District Court for the District of Maryland. *Id*.

Director is located or the circuit in which the administrative law judge has his office, if those circuits differ.

Because case law under either rationale would place any appeal of this case in the Seventh Circuit, whether at the district court or circuit court level, it appears proper that the cases of the United States Court of Appeals for the Seventh Circuit are appropriate to apply in the case *sub judice*.[7]

Section 8(f) Application

On October 9, 2002, Employer timely filed an application for relief under § 8(f) of the Act with the District Director, asserting that the Claimant suffered from the following pre-existing conditions prior to the work-related injury on August 14, 1995: (1) chronic bursitis of the right elbow; (2) elbow pain since 1993; (3) epicondylitis, right elbow; (4) arthroscopic surgery in 1985 on the right knee to the right meniscus; (5) motor vehicle accident in 1988; (6) arthroscopic surgery to left knee with ACL injury; (7) motor vehicle accident in 1990, necessitating surgery to the neck and fusion/discectomy of C5-C6/7; and (8) fracture to the left wrist in 1991. (EX-26, at 3). Employer also notes that Claimant had bilateral knee surgery; cervical surgery; and made on-going complaints about his upper right extremity. (EX-26, at 4).

Employer offers that Claimant was examined for recurrent and persistent pain in right elbow in July, 1995, at which time surgery to the right elbow was recommended. Employer submits that Claimant's medical records show the following dates of medical treatments, examinations, and medication for the right elbow: (1) July 31, 1993; (2) August 10, 1993; (3) August 18, 1993; (4) August 24, 1993; (5) October 16, 1993; (6) November 6, 1993; (7) January 8, 1994; (8) January 8, 1995; (9) January 26, 1995; (10) April 7, 1995; (11) April 22, 1995; (12) May 21, 1995; and (13) June 25, 1995. (EX-26, at 3). Employer argues that these pre-existing conditions were manifest through the medical records at the company clinic in Saudi Arabia, Peace Sun Clinic, and that the permanent disability from which Claimant suffers is materially and substantially greater than it otherwise would have been. (EX-26, at 4). Employer further states that Claimant's upper right extremity injury resulted from continuous trauma, and because of this fact, "[e]ach activity at work which contribute[d] to the claimant's disability [was] a new injury under the Longshore Act." (EX-26, at 4).

Section 8(f) of the Act was intended to encourage the hiring and retention of partially disabled workers by protecting employers from the harsh effects of the aggravation rule. *Lawson v. Suwanee Fruit & S.S. Co*., 336 U.S. 198, 201 (1949); *C & P Tel. Co. v. Director, OWCP*, 564 F.2d 503, 512 (D.C. Cir. 1977). Section 8(f) dispels the hesitancy that employers may have in hiring and retaining workers with an existing partial disability who, if injured in the new employment, could "suffer a resulting disability greater than a healthy worker would [] suffer[]." *C & P Tel. Co*., 564 F.2d at 512. In furtherance of this goal, the provisions of Section 8(f) are to be liberally construed. *Director, OWCP v. Todd Shipyards Corp.*, 625 F.2d 317 (9th Cir. 1980).

[7] This Administrative Law Judge is without authority to determine where any appeal might lay. However, the cases discussed above are set out to determine which Circuit's case law to apply in determining whether Employer is entitled to relief under Section 8(f), and to facilitate in any appeal that may be made in this case.

An employer who is granted relief under Section 8(f) is responsible only for the portion of the total disability caused by the last injury. *Id.* at 318. Generally, an employer pays 104 weeks of disability compensation, while the Special Fund pays the remainder of the compensation due the injured employee. *C & P Tel. Co.*, 564 F.2d at 510. Monies are paid into the Special Fund, created by 33 U.S.C. § 944, by insurance carriers and self-insurers. *Id*.

In order to receive relief, § 8(f) requires that an employer show: (1) the employee had an existing permanent partial disability prior to his most recent injury; (2) the employee's existing permanent partial disability was manifest to the employer prior to the most recent injury; and (3) the employee thereafter suffers from a disability which is found not to be due solely to the injury. 33 U.S.C. § 908(f)(1) (2002); *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616, 619 (9th Cir. 1983); *Todd Shipyards Corp.*, 625 F.2d at 319; *C & P Tel. Co.*, 564 F.2d at 514. The burden of proof is on the employer/carrier. 20 C.F.R. § 702.321(a) (2003); *see Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 114 (4th Cir. 1982).

In cases where an employee is permanently partially disabled as a result of the combination of the pre-existing condition and the new injury, the employer must additionally show that the resulting disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. § 908(f)(1) (2002); *see also* 20 C.F.R. § 702.321(a) (2003).

Summary of Medical Evidence

Claimant visited the Peace Sun Clinic[8] on October 28, 1992, complaining of pain in his wrist. (EX-26, at app. 4-22).[9] Claimant noted to the doctor that he dislocated his wrist in 1991 and was in a cast for eight weeks at that time. Claimant was experiencing aches and pains in his wrist, particularly when pressure was applied; however, Claimant reported that this problem did not interfere with his work. (EX-26, at app. 4-22). Dr. A. Reilly examined Claimant, noting tenderness at the joint line when the wrist was extended and under pressure. (EX-26, at app. 4-22). The doctor prescribed anti-inflammatory medication for Claimant and noted that he would reexamine Claimant in two weeks, at which time he would consider X-raying Claimant. (EX-26, at app. 4-22).

On February 11, 1993, Claimant visited Almana General Hospital in Saudi Arabia, where he saw Dr. M. M. El-Hadidi. (EX-26, at app. 4-1). Claimant was diagnosed as having "tennis elbow" in his right elbow. (EX-26, at app. 4-1). Dr. El-Hadidi noted that Claimant was given a local injection, but that Claimant's pain did not improve. (EX-26, at app. 4-1). The doctor told Claimant that the injection area could be painful for two days. (EX-26, at app. 4-1). The remaining notes are illegible.[10]

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[8] The Peace Sun Clinic was Employer's company clinic in Saudi Arabia. (Tr. at 7).

[9] Employer's Exhibit 26, Employer's Application for Relief Under Section 8(f) contained five exhibits. For clarity, the exhibits attached to the Section 8(f) application will be referred to as appendices (app.). For example, if the information is found in Appendix 4, page 1, the exhibit will be cited as follows: (EX-26, at app. 4-1).

[10] Director contests the date of this medical report, arguing that the date is not clear. (Dir. Post-Hr'g Br., at 5-6). Director contends that the date on the report is 1997, not 1993. (Dir. Post-Hr'g Br., at 5-6). However, this date does not comport with the record in this case. While Claimant did return to Saudi Arabia for a short time in the

Claimant was seen at the Peace Sun Clinic on July 31, 1993. (EX-26, at app. 4-23). Claimant complained of an aching elbow, tingling sensation in fingers of right hand, and pain in the upper deltoid area of the right arm. (EX-26, at app. 4-23). The doctor found a small, one-centimeter cystic mass in the right deltoid. No prescription was given at that time, but the doctor (initials A.R., name unknown, but possibly Dr. A. Reilly, who previously examined Claimant) noted that he would reexamine the mass if it increased in size. (EX-26, at app. 4-23).

Claimant was seen at the Peace Sun Clinic on October 16, 1993, complaining of pain and tenderness in his right arm, stated that he had been having the pain for one month, and that the pain was getting worse. (EX-26, at app. 4-17). The doctor (initials A.R., name unknown) noted that Claimant had reported this pain in August as well. (EX-26, at app. 4-17). The handwriting is unclear as to whether any treatment was undertaken on this date.

Claimant was seen by Dr. M. M. El-Hadidi on October 18; the year on the form is unclear; it is possibly 1993. (EX-26, at app. 4-19). Dr. El-Hadidi noted that Claimant had tennis elbow in his right elbow. (EX-26, at app. 4-19). The remainder of the form is largely illegible; the only other readable entry is "if continue to be painful, will need injection in the <illegible>." (EX-26, at app. 4-19).

Claimant was seen again by Dr. Reilly on October 30, 1993, at which time the doctor noted that Claimant's right tennis elbow was caused and aggravated by his working conditions. (EX-26, at app. 4-17). Dr. Reilly directed Claimant to go to Dr. Hadidi for a cortisone injection the following day. (EX-26, at app. 4-17).

Claimant saw Dr. Reilly on November 6, 1993, as a follow-up to the previous diagnosis of tennis elbow in Claimant's right elbow on October 30, 1993. (EX-26, at app. 4-18). Dr. Reilly noted that Claimant was given a localized cortisone injection by Dr. Hadidi on November 4, 1993, but that Claimant's elbow was still painful, swollen, and red. (EX-26, at app. 4-18). Claimant continued to experience pain with movement. (EX-26, at app. 4-18).

On April 30, 1994, Claimant saw Dr. A. Reilly as a follow up on the diagnosis of right tennis elbow. (EX-26, at app. 4-16). Claimant noted that the pain "radiates up and down arm" and that "sometimes [he] can't even pick up a glass of water." (EX-26, at app. 4-16). Claimant stated that he had been experiencing pain since the previous October in varying degrees, and that the pain was continuing to "come and go," varying in intensity. (EX-26, at app. 4-16). Dr. Reilly noted the previous cortisone injection that Claimant received from Dr. Hadidi, and that Claimant said the injection helped for a couple of weeks. (EX-26, at app. 4-16). Upon examining Claimant, Dr. Reilly noted tenderness in Claimant's ulnar groove and irritation to the ulnar nerve. (EX-26, at app. 4-16). Claimant was prescribed Voltaren, 50 milligrams, and told to put ice on his elbow. (EX-26, at app. 4-16).

Claimant went to the Peace Sun Clinic on February 18, 1995, complaining of tennis elbow and other unrelated swallowing problems. (EX-26, at app. 4-15). The clinic noted that Claimant was given a localized cortisone injection previously for this condition; Claimant did

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fall of 1996, there is no record that he was in Saudi Arabia in February, 1997.

not want an injection at that time, but wanted to wait until he was home on leave during the summer to get the injection. (EX-26, at app. 4-15). Upon examination, the clinic (name of examiner unreadable) noted that there was no edema, redness, or decreased range of motion in Claimant's elbow. (EX-26, at app. 4-15).

Claimant went to the Peace Sun Clinic on April 22, 1995, complaining of recurrent pain in his right elbow. (EX-26, at app. 4-12). Claimant stated that "certain movements were painful or induce[d] stiffness;" that he could not pick things up; and had shooting pains going up to his shoulder. (EX-26, at app. 4-12). Claimant noted to the doctor that he had been undergoing treatment on and off for two years with little success. (EX-26, at app. 4-12). Upon examining Claimant, the doctor (initials A.R., name unknown) noted tendonitis in Claimant's right elbow; tender RLA; and that Claimant experienced discomfort when hyperextending his right hand. (EX-26, at app. 4-12). Claimant also had trouble making a fist and holding objects in his right hand. (EX-26, at app. 4-12). Claimant's range of motion was limited two degrees subject to discomfort. (EX-26, at app. 4-12). The doctor noted that Claimant told him he was going on a two-week vacation, and sought NSAIDS. (EX-26, at app. 4-12). Claimant was diagnosed with tendonitis in his elbow and advised to rest his arm. (EX-26, at app. 4-12). The remainder of the doctor's notes on this date is illegible.

On May 21, 1995, Claimant went to the Peace Sun Clinic again complaining of recurrent pain in his right elbow, noting to the clinic that he had been experiencing this pain for one and one-half years. (EX-26, at app. 4-13). Claimant stated that the pain was "radiating from shoulder to wrist," and he was experiencing numbness in the fourth and fifth fingers on the right hand. (EX-26, at app. 4-13). The clinic noted increased warmth and redness in the elbow area at the medial epicondyle; increased tenderness to the touch; and internal resisted rotator aggravated pain. (EX-26, at app. 4-13). Claimant was diagnosed with acute exacerbation of chronic epicondylitis. (EX-26, at app. 4-13). To help ease the pain, Claimant was advised to rest; given a prescription for Feldene; and was told to use an "elastic wrap [for] support at work." (EX-26, at app. 4-13). The doctor's initials are A.R., and it appears that a physician's assistant was also involved in this clinic visit, but the names are unreadable.

On June 3, 1995, Claimant went to the Peace Sun Clinic complaining of recurrent and persistent pain in his right elbow. Claimant described the pain as "sharp" and "on and off," and also stated that his fingers were numb. (EX-26, at app. 4-5). Claimant said he experienced tingling in his index and middle finger the previous week. (EX-26, at app. 4-5). The clinic noted Claimant's ongoing wrist problem. (EX-26, at app. 4-5). Claimant was noted as having a "very tender proximal radial head and proximal muscles of the forearm. (EX-26, at app. 4-5). The doctor (whose name cannot be clearly discerned from the handwritten notes) diagnosed Claimant with chronic bursitis olecranon, and prescribed Naproxen 500 milligrams, and heat to relieve the pain. (EX-26, at app. 4-5).

On June 11, 1995, Claimant visited the Peace Sun Clinic complaining of pain in his right arm emanating from his shoulder to his fingers; Claimant described the pain as "pressure pain." (EX-26, at app. 4-5). Claimant felt that the pain was getting worse, stated that he was having difficulty doing his job, that the prescribed medication was not helping, and that he was waking up at night. (EX-26, at app. 4-5). The clinic (physician uncertain) prescribed a different

medication, Voltaren, 50 milligrams. (EX-26, at app. 4-5). The remainder of the physician's notes is illegible.

Claimant went to the Peace Sun Clinic again on June 25, 1995, and was given more Voltaren, 50 milligrams, for the pain he was experiencing in his right elbow. (EX-26, at app. 4-6).

On July 2, 1995, Claimant filled out an injury report form for Employer. (EX-26, at app. 4-9). In the report, Claimant stated that his injury was "slow occurring" and "took months before actually being recognized." (EX-26, at app. 4-9). In Claimant's opinion, the injury resulted from the use of two tools: an eighteen-inch rotary file used with a drill, and a rivet gun, which was used with a screw removal tool. (EX-26, at app. 4-9). Claimant noted that his wrist, hand, elbow, and shoulder were injured. (EX-26, at app. 4-9). The form is signed by a registered nurse (RN), but the name is unreadable.

On July 12, 1995, Claimant visited the Peace Sun Clinic, complaining of the same elbow pain. (EX-26, at app. 4-3). Claimant told the clinic that he was leaving on August 7, 1995, to return to the United States and to have an MRI performed there. (EX-26, at app. 4-3). The clinic also noted that Claimant was "determined to continue work[ing] and complete his series of plans." (EX-26, at app. 4-3). The clinic noted no improvement in the elbow and arm pain and that the medication he was previously prescribed did not help. The Clinic noted that Claimant's options were to see a doctor in the continental United States or to "declare work. comp." (EX-26, at app. 4-3).

Physician's assistant McGinnis saw Claimant on July 24, 1995, at the Peace Sun Clinic, at which time Claimant was complaining of pain in his right elbow and forearm. (EX-26, at app. 4-3). The physician's assistant noted that Claimant recited his past medical/surgical history as follows: 1985-surgery: arthroscopy right knee meniscus/MVA; 1988-surgery: arthroscopy on left knee for ACL injury/MVA; 1988-surgery: neck fusion/discectomy C5-6/6-7; 1991-fracture: left wrist "radius"; July 27, 1992-injury: left ear trauma sonic/WC/DHA; August 23, 1993-injury: index finger. (EX-26, at app. 4-3). Claimant told the physician's assistant that he worked the previous day with "repetitive drill and heavy hand tool usage" and that "no specific event" was associated with his complaint of pain. (EX-26, at app. 4-3). Claimant sought medication to relieve the pain. (EX-26, at app. 4-3). Physician's assistant McGinnis noted that Claimant had no swelling in his elbow but did have decreased grip. (EX-26, at app. 4-3). The physician's assistant believed that Claimant was suffering from an "exacerbation of presumed bursitis/tendonitis overuse injury." (EX-26, at app. 4-3). Claimant was referred to a new orthopedist. (EX-26, at app. 4-3).

Claimant saw Dr. A. Reilly at the Al Thomairy General Hospital on July 24, 1995. (EX-26, at app. 4-7). Claimant was complaining about pain in his right elbow, and noted to Dr. Reilly that he had a two-year history involving this kind of pain. (EX-26, at app. 4-7). Dr. Reilly examined Claimant and found localized tenderness, no cervical pain, and no neurological deficit. (EX-26, at app. 4-7). One sentence regarding Dr. Reilly's examination is unreadable. Dr. Reilly X-rayed the right elbow and diagnosed Claimant with chronic epicondylitis and right "tennis elbow." (EX-26, at app. 4-7). Dr. Reilly noted that Claimant had previously been given

medication as well as steroid injections, and advised Claimant about the option of undergoing extensor tendon insertion release operation. (EX-26, at app. 4-7). In a referral letter to follow up on Dr. Reilly's consultation, physician's assistant McGinnis wrote that, upon consulting with Dr. El-Aal on Claimant's X-ray, Dr. Reilly found "minor chip, calcifications as an indication of chronic epicondylitis." (EX-26, at app. 4-8).

Claimant was seen by Dr. Reilly and physician assistant Niall McGinnis at the Peace Sun Clinic on July 25, 1995, to discuss a referral from Dr. El-Aal regarding recommended surgery. (EX-26, at app. 4-4). Claimant was concerned about his job, the general aspects of the surgery, and the recovery time. (EX-26, at app. 4-4). Claimant also wanted to get a second opinion from his orthopedist in the United States. No result was reached, and Claimant was directed to call the clinic after consulting with his supervisors at work. (EX-26, at app. 4-4).

Claimant went to the Peace Sun Clinic in Saudi Arabia on July 29, 1995, because he was experiencing extreme stomach pain. (EX-26, at app. 4-2). The physician's assistant, Niall McGinnis, noted Claimant had bursitis in his right elbow (olecranon chronic) that was diagnosed June 3, 1995; that Claimant had reported elbow pain in December, 1993; and that Claimant had epicondylitis (right, diagnosed by Dr. El Aal, at the Al Thomairy Hospital, on July 24, 1995). (EX-26, at app. 4-2). The clinic determined that Claimant was having a drug reaction to Darvocet (which he was apparently previously prescribed), and Claimant was advised to rest and drink fluids. (EX-26, at app. 4-2). The physician's assistant noted Claimant's past medical/surgical history, as follows: 1985-surgery: arthroscopy right knee meniscus/MVA; 1988-surgery: neck fusion/discectomy C5-6/6-7; 1991-fracture: left wrist "radius"; July 27, 1992-injury: left ear trauma sonic/WC/DHA; August 23, 1993-injury: index finger. (EX-26, at app. 4-2).

In his attending physician report on July 29, 1995, Dr. Reilly noted that Claimant had been receiving anti-inflammatory medications and localized cortisone injections for pain. (EX-26, at app. 4-10). Claimant told Dr. Reilly that the injury occurred slowly over a few months before actually being recognized. (EX-26, at app. 4-10). Dr. Reilly also noted his diagnosis of Claimant's chronic olecranon bursitis, and felt that Claimant's statement as to how the injury occurred (over several months) was probably accurate. (EX-26, at app. 4-10).

Claimant filled out a form labeled "Employee's Report of Injury/Illness" on August 14, 1995, the date of the injury. (EX-13, at 77).[11] Claimant stated that he had tendonitis in the right elbow, which started approximately two years prior. (EX-13, at 77). Claimant noted that he had physical therapy in November, 1993, which provided no relief, and received a cortisone injection in December, 1993, which provided little to no relief. (EX-13, at 77). Claimant wrote that he saw a doctor in Valdosta, Georgia, in July, 1994, who gave him another cortisone injection and placed his arm in a cast for ten days; according to Claimant, this treatment "did not help much." (EX-13, at 78). Claimant tried several medications, also with no relief. (EX-13, at 78). Claimant wrote that the pain was bad enough to seek help about the problem approximately one month prior. (EX-13, at 78). Claimant also described his job duties on the injury form. (EX-13, at 78). The registered nurse from Macon Medical Center who received the form (name is

[11] Employer consecutively paginated its Exhibits 1 through 22. For ease of reference, the pagination as assigned by the Employer will be retained on these exhibits only (EX-1 through EX-22).

illegible) noted on the form that Dr. Riley [sic] saw Claimant in Saudi Arabia and referred him to an orthopedist there. (EX-13, at 77). Claimant saw the orthopedist, who took X-rays. (EX-13, at 77). Claimant came to Macon Medical Center to follow up on possible surgery. (EX-13, at 77).

Dr. Jay Goldberg evaluated Claimant on August 17, 1995. (EX-1, at 1). Dr. Goldberg wrote in his report to Dr. Lee Heutel that Claimant reported pain in his elbow and wrist that sometimes shoots up from the elbow to the wrist, sometimes from the arm to the hand, and sometimes from the elbow to the shoulder. (EX-1, at 1). Claimant also told Dr. Goldberg that he sometimes experienced numbness in his index and long finger. (EX-1, at 1). Dr. Goldberg X-rayed Claimant, and the X-ray revealed calcifications over the lateral epicondyle and the radial capitellar joint. (EX-1, at 1). Dr. Goldberg noted that Claimant had tenderness over these same two areas, as well as over the radial tunnel. (EX-1, at 1). Claimant had a positive radial tunnel provocative test with both resisted extension and supination. (EX-1, at 1). Dr. Goldberg wrote that "[t]he resisted supination caused pain in Claimant's distal radial forearm around the sensory radial nerve." (EX-1, at 1).

Dr. Goldberg assessment of Claimant on August 17, 1995, three days after the work-related injury, was that Claimant had chronic lateral epicondylitis and radial tunnel syndrome, as well as Wartenburg's syndrome. As to the chronic epicondylitis, Dr. Goldberg wrote that "[t]he patient has pain over the lateral epicondyle, which has been resistant to multiple steroid injections. . . . I think that there is also a component of radial capitellar inflammation." (EX-1, at 1). As to Wartenburg's syndrome, Dr. Goldberg noted that Claimant had "typical numbness" in the index and long fingers, and that this condition was strongly suggested by the positive provocative tests. (EX-1, at 1-2).

Dr. Goldberg saw Claimant again on February 20, 1996, at which time Claimant was complaining of persistent pain in his lateral elbow, numbness in the ring and small finger, and one episode of burning in his thumb and index finger. (EX-2, at 3). Upon examination, the doctor noted no tenderness at the radial tunnel or radial nerve at the elbow, but that the radiocapitellar joint was tender. (EX-2, at 3). Dr. Goldberg noted additional tenderness over the ulnar nerve at the cubital tunnel. (EX-2, at 3). Dr. Goldberg concluded that "patient's symptom resolution continues outside of the radial capitellar pain." (EX-2, at 3). Dr. Goldberg consulted with a colleague, Dr. Nunley, who suggested "debrid[al] [of] all of the radial capitellar joints as well as the lateral epicondyle, and then perform a local soft tissue flap re-coverage." (EX-2, at 3). Dr. Goldberg did not agree with his colleague, stating that this procedure was not warranted for "intrinsic elbow problems." (EX-2, at 3). Dr. Goldberg noted that Claimant could be experiencing ulnar nerve irritability, given his past history of C5-C6 cervical fusion, so Dr. Goldberg desired to take nerve conduction studies to determine whether Claimant was experiencing nerve compression. (EX-2, at 3).

Claimant was examined in Dr. William B. Stetson's office on March 11, 1996, in order to obtain a final disability rating of Claimant under the AMA guidelines. (EX-3, at 5). In the cover letter (dated March 19, 1996), accompanying the report, Dr. Stetson noted that he believed Mr. Cox was ready to return to work. (EX-3, at 4). However, Dr. Stetson qualified his statement by writing that "I do feel he has reached his maximum medical improvement concerning his right

shoulder. However, I do feel that his right elbow pain has been inhibiting his rehabilitation from his shoulder surgery and may continue to give him problems in the future." (EX-3, at 4). Julie Freiner, OTR, performed Claimant's examination, and noted that Claimant reported tingling and numbness across the base of his thumb to the fourth and fifth digits; a sharp pain in the elbow when he supinated his forearm, and when he returned his arm to a pronated position, the pain began pulsating in his dorsal forearm into the biceps and shoulder area; and that Claimant felt his elbow pain was causing decreased strength in his shoulder. (EX-3, at 5).

Claimant saw Dr. Goldberg again on June 20, 1996, approximately three months after his cubital, carpal, and ulnar tunnel releases. (EX-4, at 11). Claimant reported to Dr. Goldberg that the ulnar paresthesia in his small finger was resolved. (EX-4, at 11). Claimant reported to the doctor that his motion in his elbow was still restricted, and he was experiencing some pain on the outside portion of his arm. (EX-4, at 11). Dr. Goldberg wrote that he felt Claimant had experienced the majority of his improvement. (EX-4, at 11). Therefore, the doctor discharged him from his care. (EX-4, at 11).

Dr. Heutel wrote a letter to Dave Hutchins on July 12, 1996, to relate his findings upon examining Claimant on July 8, 1996, and on July 12, 1996. (EX-6, at 18). At that time, Claimant informed Dr. Heutel that he did not want surgery, but rather sought a second opinion. (EX-6, at 18). Claimant told Dr. Heutel that he was experienced pain in his right shoulder when the pain radiated from his elbow, but that his elbow only hurt when doing certain activities. (EX-6, at 18). Dr. Heutel noted Claimant's statements that he could not completely extend his right elbow, could only lift some objects in front of his body, and had discomfort in his right elbow when lifting with internal rotation at his shoulder. (EX-6, at 18). Claimant had no complaints about his right wrist. (EX-6, at 18).

Dr. Heutel went on to write in his July 12, 1996, letter that he found that Claimant had full range of motion in his right shoulder and could extend his right elbow to 170 degrees. (EX-6, at 18-19). Claimant was "very tender in the ulnar groove over the cubital tunnel where surgical intervention was performed." (EX-6, at 19). Claimant also had "tenderness on external rotation against pressure over the medial portion of the elbow" and "on internal rotation on the medial side of the right elbow." (EX-6, at 19). Dr. Heutel noted that he personally observed Claimant's job tasks in December, 1995, and that Claimant could return to work given the following limitations: "1) work only with aluminum; 2) limited (no more than one hour/day) for use of impact/vibrating tools; 3) no grasping/gripping more than 40 pounds with right upper extremity." (EX-6, at 19).

Dr. Goldberg saw Claimant again on July 29, 1996, for a final impairment rating. (EX-5, at 12). Upon examination, Dr. Goldberg noted that Claimant had normal sensation in the median, ulnar, and radial nerves of his right hand. (EX-5, at 12). Claimant also had decreased extension in his right wrist, which resulted in two percent functional impairment according to Dr. Goldberg, who noted that extension/flexion was 53/72 degrees on the right side, versus 66/66 in Claimant's left elbow. (EX-5, at 12). Claimant had a decrease in right elbow extension (range of motion at the right elbow was 11/126 degrees, versus 1/140 degrees in the left elbow), which resulted in one percent functional impairment. (EX-5, at 12). Dr. Goldberg also examined Claimant to determine whether his grip strength was impaired. He wrote that Claimant's pinch

strength was eighteen pounds on the right side and nineteen pounds on the left, and that his grip strength was seventy-six pounds on the right side, and 101 pounds on the left side. (EX-5, at 12). Dr. Goldberg found that Claimant's rapid exchange grip produced a range between 66 and 99 pounds on the right side, and a range of 87 to 106 pounds on the left side. (EX-5, at 12). Based upon these results, Dr. Goldberg assigned no functional impairment for grip strength. (EX-5, at 12). Therefore, the total functional impairment assigned to Claimant's right upper extremity as a result of his wrist and elbow surgery was 3%.[12] (EX-5, at 12).

On November 12, 1996, Claimant returned from Saudi Arabia[13] and saw Dr. Goldberg; Claimant was complaining of persistent pain in his right upper extremity. (EX-5, at 13). The pain was located in the median and ulnar nerve regions at the right wrist and elbow, as well as on the outside of the arm over the lateral epicondyle; Claimant also reported having an "unstable feeling" in his elbow when rotating his arm, and pain in his right shoulder. (EX-5, at 13). Upon examination, Dr. Goldberg noted tenderness over the median and ulnar nerves of the right and elbow, Tinel signs over each area, and a mild increase in symptoms when a Phalen's test was performed. (EX-5, at 13). Claimant did not have any elbow instability that day, nor did he display tenderness in his supraclavicular brachial plexus; his thoracic outlet provocative maneuver was also negative. (EX-5, at 13).

Dr. Goldberg concluded that Claimant was suffering from residual tenderness over the nerves as a result of the surgery and the original repetitive injury. (EX-5, at 13). It was Dr. Goldberg's opinion that Claimant had no "specific problem which can't be repaired by surgery or treated with therapy," so he released Claimant from his care once again. (EX-5, at 13). Dr. Goldberg believed that Claimant could return to Saudi Arabia to see how he could manage in his duties, and would see him in the future as needed. (EX-5, at 13).

On May 5, 1997, Dr. Heutel provided an impairment rating of twelve percent as to Claimant's right upper extremity due to his injury on August 14, 1995. (EX-5, at 14, 17). In providing this rating, Dr. Heutel recounted the major events since Claimant's injury; he also reviewed the final evaluations of Drs. Stetson and Goldberg. (EX-5, at 14-15). Dr. Heutel noted that Dr. Stetson's impression of Claimant was that his shoulder, particularly the rotator cuff, was doing well, and that his muscle strength could increase by continuing his weight program. (EX-5, at 14). Dr. Heutel examined Dr. Goldberg's report from July 29, 1996. (EX-5, at 14-15).

Dr. Heutel also discussed Claimant's condition with Dr. McCollum from Atlanta, Georgia, on January 28, 1997. (EX-5, at 15). Dr. McCollum saw Claimant for his tendonitis, and when he examined him, noted that Claimant was tender at the medial and lateral epicondyles. (EX-5, at 15). Dr. McCollum injected Claimant's right lateral epicondyle, and found no instability at the medial epicondyle. (EX-5, at 15). In Dr. McCollum's opinion,

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[12] Dr. Goldberg noted in the July 29, 1996, letter, that Dr. Stetson would provide the final impairment ratings for Claimant's shoulder, as Dr. Stetson had performed the surgery on Claimant's right rotator cuff. (EX-5, at 12).

[13] Claimant returned to work in Saudi Arabia in September, 1996, and remained there approximately one month. (Tr. at 79-80). Claimant did not return to his previous duties, but instead was assigned administrative tasks, particularly, replacing pages in three-ring binders. (Tr. at 80-81).

Claimant was "as good as he is going to be" and could work as long as the pain was not too severe. (EX-5, at 15).

Dr. Heutel performed his own physical examination of Claimant on February 7, 1997, at which time the doctor found that Claimant could completely extend his right elbow, but that when he rested his elbow on the olecranon process, he experienced numbness in his right little and ring fingers. (EX-5, at 15). Claimant told Dr. Heutel that he was not exercising his right shoulder and was not performing any overhead work, but that his left elbow hurts when he drives a car. (EX-5, at 15). Claimant also told the doctor that his grip strength was "as good as ever," but he was not doing any work. (EX-5, at 15). Claimant expressed concern about looseness in his right elbow and did not think he could use impact or vibratory tools. (EX-5, at 15-16).

Dr. Heutel performed a series of tests, finding that Claimant had full range of motion in his right shoulder, elbow, and wrist, and that Phalen's test was negative bilaterally. (EX-5, at 16). Dr. Heutel performed dynanometer testing as well. (EX-5, at 16). Dr. Heutel found no abnormal motions, no sensory changes in the right upper extremity from the shoulder distally, no peripheral nerve disorders, and no hypesthesia in the right upper extremity. (EX-5, at 16). Claimant's grip strength was 91% of average strength in the right hand, and 107% of average strength in the left hand. (EX-5, at 16).

Dr. Heutel's conclusion that Claimant had an overall permanent partial disability rating of twelve percent was itemized as follows: (1) two percent permanent partial disability in his shoulder because of "residual weakness in the anterior deltoids and pectoralis musculature"; (2) eight percent permanent partial disability at the right elbow; and (3) eight percent permanent impairment of the right wrist, all due to the August 14, 1995 injury. (EX-5, at 17).

Dr. John I. Foster evaluated Claimant on December 3, 2002. (EX-8, at 23). Dr. Foster concluded that "causation does exist between the patient's right upper extremity symptoms and his work related injury of 14 August 1995," and he believed Claimant [sic] qualified for § 8(f) relief. (EX-8, at 23-24). Dr. Foster also concluded that causation did not exist between Claimant's back injury and the work-related injury. (EX-8, at 23). Dr. Foster believed that Claimant's history, as well as the results of his physical examination, suggested a component at least of sympathetic mediated pain, which he noted had not been diagnostically ruled out. (EX-8, at 23). Dr. Foster recommended that Claimant undergo "at least one diagnostic right upper extremity sympathetic block. If he has no evidence of RSD, I could consider him then to be at maximum medical improvement." (EX-8, at 23). However, the doctor noted that if Claimant showed signs of RSD, then it would be appropriate for him to undergo additional sympathetic blocks. (EX-8, at 23).

In reaching his conclusion, Dr. Foster took Claimant's medical history, noting the date of the injury, Claimant's record of active duty military service, and his length of time working for Employer. (EX-8, at 25). He also noted Claimant's past surgical history as to the anterior cervical discectomy and fusion at the C5-6 and C6-7 levels when Claimant was on active military duty; arthroscopic knee surgery on the right knee in 1988 and the left knee in 1990; and the several surgical procedures on his right arm. (EX-8, at 25). The surgeries on Claimant's right arm included: release of the radial nerve/posterior interossesous nerve in the dorsal right

forearm; right ulnar nerve transposition; and right should arthroscopy; right carpal tunnel release. (EX-8, at 25). As to his symptoms at the time of the examination, Claimant told Dr. Foster that he continued to have pain and "a squeezing sensation in his hand, decreased grip strength as well as pain in the posterior aspect of the right elbow," and periodic decreases in temperature in his right hand. (EX-8, at 25). Dr. Foster stated in his evaluation that he reviewed all of the medical records forwarded to him, including records from Drs. McCollum, Kornfield, Kirkpatrick, Chevres, Weed, Goldberg, Sava, and Heutel, as well as diagnostic studies, physiotherapy records, medical records from Saudi Arabia, and Claimant's deposition taken on March 30, 1998. (EX-8, at 26).

Dr. Foster's physical examination of Claimant yielded the following observations.

> Physical examination of the neck shows no palpable tenderness. There is active full range of motion. There is negative Spurling's bilaterally. Upper extremity motor exam is 5/5 throughout. Sensory exam is intact including 2 point discrimination. Deep tendon reflexes are 1+ symmetric biceps, triceps and brachioradialis. There is negative Hoffman. There is negative Tinels at the plexus, cubital and carpal tunnels and negative Tinels over the radial tunnel release. There is negative Phalens, negative reverse Phalens and negative elbow flexion test. There are no obvious sweating, temperature or hair pattern differences from right to left.

(EX-8, at 28).

Based upon these observations, Dr. Foster gave the following diagnosis:

1. Rule out reflex sympathetic dystrophy right upper extremity.
2. Status post right subacromial decompression, right cubital tunnel release, right carpal tunnel release, right ulnar nerve release in Guyon's canal.
3. Right L4-5 herniated nucleus pulposus.

(EX-8, at 28).

Dr. Foster opined that Claimant was appropriately treated by physicians who previously saw him. (EX-8, at 28). Dr. Foster further stated that Claimant has medical abnormalities that predated the injury on August 14, 1995, "namely his previous anterior cervical discectomy and fusion as well as arthroscopy to the bilateral knees and chronic right elbow lateral epicondylitis." (EX-8, at 28). Given this history and the repetitive nature of Claimant's work for Employer, Dr. Foster wrote that it was his "medical opinion that causation does exist between his right upper extremity complaints both current and previous and his work related injury of 14 August 1995." (EX-8, at 28). Dr. Foster explained that he believed "all of patient's current right upper extremity complaints relate to his industrial injury. However, I would apportion 20% of his current problems to his right elbow injury sustained between 1983 and 1995 and 80% to the actual alleged work injury of 14 August 1995." (EX-8, at 29). In Dr. Foster's opinion, Claimant's "disability is materially and substantially greater because of his preexisting right elbow pathology than would have been the case in the absence of this preexisting disability."

(EX-8, at 29). Given Claimant's condition and the fact that Claimant had not undergone sympathetic block treatment, Dr. Foster wrote that it was not possible to determine a permanent partial impairment rating at that time. (EX-8, at 29).

In an IME overview report prepared by Dr. Foster on December 3, 2002, Dr. Foster noted causation between the right shoulder and upper extremity, and that permanent partial disability was TBD (to be determined, presumably). (EX-9, at 30). Dr. Foster noted that Claimant was capable of sedentary duty with lifting of no more than twenty pounds; no repetitive grasping of more than ten pounds; and no use of high torque tools. (EX-9, at 30).

Dr. John Foster was deposed on March 13, 2003, in Atlanta, Georgia. (EX-24, at 1). Dr. Foster is the Staff Orthopedic surgeon at Northside Hospital at the Emory Dunwoody Medical Center in Atlanta; he has also had a private orthopedic practice for nine years. (EX-24, at 6-7). Dr. Foster testified that he examined Claimant on December 3, 2002. (EX-24, at 8). Dr. Foster testified as to the contents of the report, entered as Employer's Exhibit 8, which is outlined above. (EX-24, at 9).

Dr. Foster elaborated on his written findings during the deposition. Dr. Foster testified that he wanted to rule out RSD (reflex sympathetic dystrophy) because the question had been raised by a physician whose records Dr. Foster had previously reviewed, so he (Dr. Foster) sought a definitive answer as to that issue. (EX-24, at 12). According to Dr. Foster, administering a sympathetic block to Claimant would determine whether Claimant had RSD, but his initial examination did not indicate this condition. (EX-24, at 13).

Dr. Foster also testified as to his apportionment of impairment between Claimant's work-related injury and Claimant's prior problems. In Dr. Foster's opinion, eighty percent of Claimant's problems "related to the repetitive stress injury" suffered on August 14, 1995; the remaining twenty percent, according to Dr. Foster, would have existed regardless of the work injury. (EX-24, at 16). Dr. Foster specifically noted Claimant's treatment for right lateral epicondylitis and olecranon bursitis on February 11, 1993, and explained that he felt "that aspect of [Claimant's] problem was distinct from the nerve decompressions that he's undergone otherwise associated with his repetitive stress injury." (EX-24, at 16). This finding led Dr. Foster to conclude that twenty percent of Claimant's problems would have existed regardless of the work injury. (EX-24, at 16).

1. Second Injury

The "second injury" requirement is explicit in § 8(f). 33 U.S.C. § 908(f)(1) (2002) ("In any case in which an employee having an existing permanent partial disability *suffers injury*, the employer shall provide compensation for such disability as is found to be *attributable to that injury* . . . .") (emphasis added). "Injury" is defined by the Act as:

> accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally and unavoidably results from such accidental injury, and includes

> an injury caused by the willful act of a third person directed against an employee because of his employment.

Id. § 902(2). Thus, an employer will not qualify for Special Fund relief if the employee's second injury does not arise out of and in the course of employment with that particular employer. *See Lawson v. Suwanee Fruit & S.S. Co*., 336 U.S. 198, 200 (1949) (interpreting the "second injury" requirement of § 8(f)).

The Special Fund will not provide relief if the employee's injuries are a natural progression of a prior, non-work related injury, because in such a situation, the employer would not be liable for the underlying or previous injury. However, if the pre-existing disability is aggravated by the working conditions, the Special Fund will provide relief. *See Found. Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 624 (9th Cir. 1991) ("'If . . . the subsequent injury aggravated, accelerated or combined with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury, and the subsequent employer is responsible.'") (quoting *Kelaita v. Director, OWCP*, 799 F.2d 1308, 1311 (9th Cir. 1986)); *Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 1316 (11th Cir. 1988) (holding that the "second injury" requirement under Section 8(f) is met if the aggravation of the pre-existing disability is work-related, so long as the employer shows actual aggravation); *C & P Tel. Co. v. Director, OWCP*, 564 F.2d 503, 514 (D.C. Cir. 1977) (finding that coverage under Section 8(f) has been allowed in aggravation cases).

In the present case, the "second injury" element is easily met. Employer and Carrier assert that Claimant suffered a work-related injury on August 14, 1995. (ALJ Dec. & Order on Recon., July 2, 2003, at app. 1; JX-1, at 1). The Director concurs that Claimant suffered a work injury on that date. (Dir. Post-Hr'g Br., at 5). Further, based upon the stipulations of the Claimant, Employer, and Carrier, I previously found that Claimant suffered a work-related injury on August 14, 1995. (ALJ Dec. & Order on Recon., July 2, 2003, at 2).

2. Pre-Existing Disability

To prove an employee's pre-existing permanent partial disability, an employer may establish the disability preceded the most recent injury by showing "the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability," the so-called "cautious employer" test. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1145 (9th Cir. 1991) (quoting *C & P Tel. Co. v. Director, OWCP*, 564 F.2d 503, 513 (D.C. Cir. 1977)). It will not suffice to show that an employee merely had an injury in the past. *Id*. Instead, the employer must show that this injury caused a serious, lasting problem to the employee. *Id*. at 1145-46. For example, the Ninth Circuit concluded in *Lockheed Shipbuilding* that the administrative law judge correctly found that the injured employee had a permanent preexisting disability because of his intermittent episodes of low back pain, which occurred over seven years prior to the work-related injury to the employee's back. *Id*. Similarly, the court in *C & P Telephone Co.* found that an injured employee had a pre-existing permanent disability where the record demonstrated "an unbroken

chain of frequent work absences" due to back trouble. *C & P Tel. Co. v. Director, OWCP*, 564 F.2d 503, 514 (D.C. Cir. 1977).

Further, the employer need not show that the pre-existing disability caused an economic loss. *Lawson v. Suwanee Fruit & S.S. Co*., 336 U.S. 198, 201 (1949); *C & P Tel. Co.*, 564 F.2d at 512-13. The *Lawson* Court concluded that Congress intended the term "disability" in Section 8(f) to be "a broader and more usual concept," as opposed to a reference to the statutory definition. *Lawson*, 336 U.S. at 201. To view "disability" otherwise would result in "obvious incongruities" in Section 8(f) by requiring that the previous disability arise out of and in the course of employment. *Id*. at 200-01. In *C & P Telephone Co*., the court further explained that "the term 'disability' in new § 8(f) can be an economic disability under § 8(c)(21) or one of the scheduled losses specified in § 8(c)(1)-(20), but it is not limited to those cases alone." *C & P Tel. Co.*, 564 F.2d at 513.

Employer argues in his post-hearing brief that Claimant suffered from numerous pre-existing disabilities. *See* pg. 6, *supra* (listing Claimant's pre-existing disabilities); Empl. Post-Hr'g Br., at 3. Among the alleged pre-existing disabilities are chronic bursitis; elbow pain since 1993; and epicondylitis in the right elbow. Employer further argues that all of these pre-existing disabilities would have caused a cautious employer to discharge Claimant from employment because of the heightened risk of injury to someone with those conditions. (Empl. Post-Hr'g Br., at 3-4).

Director argues in his post-hearing brief that Employer did not present any evidence that Claimant "was under any restrictions prior to the work injury." (Dir. Post-Hr'g Br., at 3). Director further asserts that, while Claimant may have required medical attention for certain conditions in the past, those conditions did not render him permanently partially disabled. (Dir. Post-Hr'g Br., at 5-6). Instead, Director argues that any pre-existing condition that Claimant had prior to the industrial injury on August 14, 1995, was not a previous injury, but rather an initial manifestation of Claimant's ultimate injury. (Dir. Post-Hr'g Br., at 6). Director further contends that Employer has not sustained its burden of proof because it has not provided any medical records evidence as to Claimant's previous disabilities. (Dir. Post-Hr'g Br., at 7).

In his post-hearing brief, Director incorporates the arguments made in his Brief in Support of Motion to Dismiss Employer's Application for 8(f) Relief. (Dir. Post-Hr'g Br., at 2). In Director's previous brief, he additionally argued that Employer failed to explain in detail how Claimant's conditions rose to the level of a pre-existing condition. (Dir. Br. Mot. Dismiss, at 8). To this extent, Director argues that "[E]mployer offers no evidence that these conditions left [Claimant] with a scheduled permanent partial disability, caused [Claimant] a loss of wage-earning capacity, predisposed [Claimant] to further injury, or constituted the type of serious and long-lasting condition that would cause a cautious employer to refuse to hire or retain [Claimant]." (Dir. Br. Mot. Dismiss, at 8).

Upon consideration, I find that Employer in this case has proven that Claimant had pre-existing disabilities as such that would meet the "cautious employer" test. The medical evidence submitted by Employer shows multiple entries by physicians who determined that Claimant suffered from chronic bursitis olecranon, persistent elbow pain, and epicondylitis (otherwise

known as tennis elbow) in the right elbow prior to Claimant's injury on August 14, 1995. The first instance of diagnosis of chronic bursitis olecranon was on June 3, 1995, when Claimant was experiencing numb fingers and had a slight limitation in his range of motion. At the July 24, 1995, visit to the Peace Sun Clinic, Claimant was diagnosed with "exacerbation of presumed bursitis/tendonitis overuse injury." (EX-26, at app. 4-3).

Further, Claimant was diagnosed as having tennis elbow, or epicondylitis, in his right elbow on several occasions. The medical records indicate the first diagnosis of this condition was on February 11, 1993, by Dr. El-Hadidi at Almana General Hospital in Saudi Arabia, at which time Claimant was given a local injection for the pain. (EX-26, at app. 4-1). Claimant was again diagnosed with epicondylitis by Dr. Reilly on October 30, 1993. Dr. Reilly noted during that visit that Claimant's epicondylitis in the right elbow was caused and aggravated by his working conditions. (EX-26, at app. 4-17). On November 6, 1993, and April 30, 1994, Claimant had follow-up visits with Dr. Reilly regarding his tennis elbow. At the April 30, 1994, visit, Dr. Reilly noted that Claimant reported trouble holding a glass of water. Claimant was again diagnosed with and found to be complaining of epicondylitis on the following dates: February 18, 1995; May 21, 1995; and July 24, 1995.

The May 21, 1995, diagnosis is important to note, because the doctor diagnosed Claimant with "acute exacerbation of chronic epicondylitis." The commonly accepted medical definition of "chronic" is "persisting for a long time." DORLAND'S POCKET MEDICAL DICTIONARY 169 (25th ed. 1995). This diagnosis indicates that Claimant's condition had existed or, perhaps more appropriately, persisted for a substantial period of time.

Claimant visited the Peace Sun Clinic, Employer's company clinic, numerous times complaining of pain in his elbow. These visits are in addition to those times where Claimant visited the clinic and the doctor denoted his symptoms as either bursitis or epicondylitis. The first documented instance of elbow pain was on July 31, 1993. Recurrent elbow pain was also diagnosed on April 22, 1995, at which time Claimant could not pick up objects or make a fist. During the April 22, 1995, visit, Claimant was diagnosed with tendonitis in his right elbow and was advised to rest his arm.

Taken together, I find that these conditions from which Claimant suffered were serious enough in nature and would have motivated an employer to discharge the employee because of a greater risk of a work-related accident and compensation liability. As reflected in the various doctors' notations, Claimant's pain was persistent, and his condition led Dr. Reilly to believe that Claimant's working conditions were exacerbating his symptoms and causing him to overuse his arm, leading Claimant to have a physical disability in the broad sense of the term, as intended by the Court in *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949). Claimant visited the doctor nineteen times starting in October, 1992, complaining of pain in the right upper extremity, which further demonstrates the lasting and serious nature of the disabilities from which Claimant suffered. Claimant also experienced difficulty in grasping items on several occasions, which could have increased his risk of injury since his job included grasping tools.

Dr. Foster testified at his deposition that, if he were to hire someone to perform Claimant's tasks for Employer, he (Dr. Foster) would choose someone without Claimant's elbow

problems (including epicondylitis) if given the choice. (EX-24, at 21). Dr. Foster based his testimony on his experience as a pilot, a Navy doctor, an aircraft division officer, and his knowledge of structural mechanics of military aircraft. (EX-24, at 19-20; *see also* EX-21, at 215-18). Dr. Foster believed that the heavy equipment work, often conducted at heights and at awkward positions, would pose a heightened risk to a person with Claimant's disabilities. (EX-24, at 21).

Director argues that Employer has not established that Claimant had a pre-existing disability for several reasons. First, Director asserts that Employer has not proven that Claimant ever returned to work under any medical restrictions. The medical evidence shows that this is not entirely accurate. While there were no specific restrictions placed upon Claimant as to the weight of objects he could or should lift, Claimant was advised to put ice on his elbow (April 30, 1994); to rest his arm (April 22, 1995, and May 21, 1995); to use an elastic wrap for support while working (May 21, 1995); and to use heat to relieve pain in his forearm (June 3, 1995). Further, Claimant was also prescribed medication on several instances, and additionally received localized cortisone injections in his arm to help ease the persistent pain. Claimant was prescribed Feldene on May 21, 1995; Voltaren on April 30, 1994, June 11, 1995, and June 25, 1995; and Naproxen on June 3, 1995. Claimant also received localized cortisone injections for the pain in his arm on February 11, 1993, and November 4, 1993.

Second, Director argues that Employer has not established its burden of proof as to this element because Claimant was not permanently disabled, but rather, his conditions were merely initial manifestations of his ultimate injury, but that Employer presents no evidence to this extent. Dr. Foster's conclusion counters and disproves this portion of Director's argument. In his evaluation of Claimant, Dr. Foster indicated that Claimant's chronic epicondylitis in his right elbow, his previous anterior cervical discectomy and fusion, and arthroscopy to the bilateral knees all predated the work-related injury of August 14, 1995. (EX-8, at 28). Dr. Foster also testified at his deposition that Claimant's epicondylitis and chronic olecranon bursitis were "distinct from the nerve decompression that he's undergone otherwise associated with his repetitive stress injury." (EX-24, at 16). Further, Dr. Goldberg examined Claimant on August 17, 1995, three days after the injury, and noted not only chronic lateral epicondylitis, but also radial tunnel syndrome, Wartenburg's syndrome, and an inflamed radial capitellar area, three conditions that Claimant had not been previously diagnosed as having.

Next, Director contends that Employer has not provided any medical records evidencing Claimant's previous disabilities; however, the medical summary above, which consists of medical records offered by Employer, discounts this contention. The medical records clearly demonstrate that Claimant was suffering from pre-existing disabilities prior to the work-related injury on August 14, 1995, and Dr. Foster's report and deposed testimony corroborates this point.

Director further argues that Employer did not explain how Claimant's conditions were pre-existing conditions because there was no evidence that Claimant's conditions rose to the level of a scheduled permanent partial disability, that Claimant lost wage-earning capacity, that Claimant was predisposed to further injury, or that Claimant would fail the cautious employer test. The cautious employer test was addressed above and will not be re-visited. Director's

scheduled permanent partial disability argument necessarily fails because, under *Lawson v. Suwanee Fruit & Steamship Co.*, the term disability is broader than the statutory definition. The court in *C & P Telephone Co.* further stated that a "disability" need not be a scheduled loss under 33 U.S.C. § 8(c)(1)-(20) to qualify as a pre-existing disability, nor does the disability have to rise to the level of an economic disability such as set forth under 33 U.S.C. § 8(c)(21). As to Director's last argument regarding predisposal, Dr. Foster opined in his written evaluation that causation existed between Claimant's work-related injuries and those injuries suffered on August 14, 1995. (EX-8, at 28).

3. Manifestation

While it is not expressly set forth in the statute, the courts have imposed the manifestation requirement upon employers, reasoning that the lack of such requirement would be contrary to Congress's intent of preventing discrimination. *See Director, OWCP v. Sun Ship Inc.*, 150 F.3d 288, 295 (3d Cir. 1998) ("Courts have reasoned that an employer cannot discriminate if it does not know of a pre-existing injury."); *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616, 618-19 (9th Cir. 1983) (finding that Section 8(f) cannot have its intended effect of removing the disincentive to an employer's hiring of disabled workers unless the employer is aware of the disability). The accompanying regulation to Section 8(f), 20 C.F.R. § 702.321, includes the manifestation requirement. 20 C.F.R. § 702.321(a)(1)(iii) (2003).

Knowledge of an employee's pre-existing disability can be either actual or constructive knowledge; as one court stated, "[i]t is the availability of knowledge, rather than actual knowledge of the condition, that is relevant to determining manifestation." *See Sun Ship Inc.*, 150 F.3d at 295. "Courts [have] credited the employer with knowledge of a preexisting condition which could have been discovered in an employee's medical records even if the employer did not actually know." *Id.* The medical records need not be precise as to the severity of the employee's pre-existing disability, so long as the records contain information as to the injury or condition itself. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990) (citing *Berkstresser v. WMATA*, 16 BRBS 231, 235 (1984)).

The timing of when the actual or constructive knowledge was acquired is also relevant. As the Ninth Circuit found in *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616 (9th Cir. 1983):

> If § 8(f) relief is available only when the pre-existing condition is manifest at the time of hiring, the employer will feel free to hire workers with existing handicaps, but not to retain workers who become handicapped during their tenure on the job.
> . . . .
> The purpose of retaining workers who become handicapped during their employment cannot be accomplished unless § 8(f) relief is available when the worker's pre-existing injury becomes manifest after hiring but before final injury.

Cargill, 709 F.2d at 619 (citations omitted). Therefore, the court in *Cargill* held that the manifestation requirement is met so long as the pre-existing disability is manifest "prior to the last injury." *Id*. It is also important to note that the employee need not be impaired by his

disability at the time of hire or retention; instead, "an asymptomatic disability may be sufficient to motivate an employment decision and fulfill the 'manifest' requirement." *Berkstresser*, 921 F.2d at 310.

The Sixth Circuit has adopted a slightly different approach to the manifestation requirement. While not requiring actual knowledge by the employer, the Sixth Circuit does require that the pre-existing disability have manifested itself to *someone*. *Am. Shipbuilding Co. v. Director, OWCP*, 865 F.2d 727, 732 (6th Cir. 1989) (finding that the manifestation requirement as adopted by a majority of the circuits rewards prospective employers for seeking out whether an employer has a pre-existing disability). The Sixth Circuit reasoned that a manifestation requirement was useful in preventing fraud by ensuring that the pre-existing condition existed prior to the second injury. *Id*.

Employer asserts that it had actual, objective knowledge of Claimant's pre-existing disabilities because of Claimant's "on-going complaints in the right upper extremity . . . while he was working as a Structural Mechanic for McDonnell Douglas in Saudi Arabia." (Empl. Post-Hr'g Br., at 4). Employer also offers as proof of the manifestation element that Claimant visited the company clinic, Peace Sun Clinic, several times for problems with his right upper extremity, and therefore, Employer was actually aware of the pre-existing disabilities. (Empl. Post-Hr'g Br., at 4). Employer alternatively offers that, even if it were found to not have actual knowledge, it did have constructive knowledge of Claimant's pre-existing disabilities from the company clinic's notes as to his prior neck fusion, elbow complaints, and arthroscopic surgeries of both knees. (Empl. Post-Hr'g Br., at 5). Employer noted in its Section 8(f) application that it was continuing to seek specific records to document Claimant's neck and knee surgeries. (EX-26, at 4).

Director argues that there was no prior permanent partial disability, that any condition Claimant suffered prior to the injury date was simply an initial manifestation of the work injury, and therefore, Employer has not presented any evidence to prove that it was aware that Claimant had any pre-existing condition. (Dir. Post-Hr'g Br., at 3). Additionally, Director argues that Employer's failure to submit medical records as evidence of Claimant's prior neck and knee problems is fatal to establishing its burden of proof as to manifestation. (Dir. Br. Mot. Dismiss, at 8).

Upon consideration, I find that Employer has proven manifestation in this case. Employer has shown that it had both actual and constructive knowledge of Claimant's pre-existing permanent disabilities. Claimant visited the company clinic, Peace Sun Clinic, on numerous occasions in the months preceding his work-related injury, and on at least two occasions, noted to clinic personnel his previous injuries. Once Claimant noted these pre-existing conditions to Employer's clinic, Employer had constructive, if not actual, knowledge of Claimant's pre-existing conditions. Employer also had knowledge of the conditions that he developed while working for Employer. As the court found in *Cargill*, a pre-existing condition need not exist at the time of hire, but rather, can develop while the injured employee worked for the employer, which is the case for some of Claimant's pre-existing conditions, including his epicondylitis and chronic olecranon bursitis. Further, on July 2, 1995, Claimant filled out an injury report noting injury to his right upper extremity, more particularly his wrist, hand, elbow,

and shoulder. (EX-26, at app. 4-9). This form is signed by a registered nurse, and at the top of the form, the injured employee is directed to send the form to Employer's Occupational Safety and Medical Services Department. (EX-26, at app. 4-9).

Director's arguments that there was no prior permanent partial disability and that Claimant's conditions were merely initial manifestations of his work injury have been addressed in the previous section. Director's final contention against manifestation, as to Employer's failure to submit medical records, fails because as the Third Circuit stated in *Sun Ship*, the key factor for manifestation is the availability of knowledge, rather than actual knowledge. Because Employer was on notice and had constructive knowledge as to Claimant's pre-existing injuries, it could have sought out Claimant's relevant medical records.

4. Injury is not the Sole Cause of the Disability

Section 8(f) also requires the employer to prove that the resulting disability is "not due solely" to the work-related injury. 33 U.S.C. § 908(f)(1) (2002). Employer's evidence, to this extent, must show that the pre-existing disability contributed to the current disability. *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 750 (5th Cir. 1990) (per curiam). If the work-related injury is alone sufficient to cause the resulting disability, then the employer will not be entitled to Section 8(f) relief, but instead will be responsible for paying the employee the entire compensation due. *Director, OWCP v. Bath Iron Works Corp.*, 129 F.3d 45, 50 (1st Cir. 1997) (citing *Ceres Marine Terminals v. Director, OWCP*, 118 F.3d 387, 390 (5th Cir. 1997)). The employer cannot merely demonstrate "that the employee's pre-existing injury compounded his employment-related injury; rather, the employer must show that, but for [the] pre-existing disability, claimant would be employable." *Id*. at 51 (citing *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 1085 (D.C. Cir. 1994)).

Employer asserts that Claimant's pre-existing disability and the industrial injury combined to cause Claimant's current permanent partial disability. Employer points to the finding of Dr. Foster in which Dr. Foster found that Claimant's "medical abnormalities . . . pre-date [Claimant's] alleged date of work injury of August 14, 1995, namely his previous anterior cervical discectomy and fusion, as well as arthroscopy to bilateral knees and chronic right elbow lateral epicondylitis. (Empl. Post-Hr'g Br., at 5). Director argues that Claimant's entire disability is due solely to his work injury, and that Claimant's previous capacity to work was not impaired in any way by his work-related injury on August 14, 1995. (Dir. Post-Hr'g Br., at 4).

Dr. Foster testified at his deposition and wrote in his evaluation report that twenty percent of Claimant's disability would have existed regardless of the work-related injuries that Claimant suffered. (EX-8, at 29). Dr. Foster also noted that he believed that the Claimant's pre-existing disabilities and his work-related injuries were causally connected, in that Claimant's medical history as well as the repetitive nature of his work both contributed to Claimant's current disability. (EX-8, at 29). Further, Dr. Goldberg's examination and assessment on August 17, 1995, three days after the date of injury, indicates that Claimant had not only the pre-existing disabilities, but additional injuries as well. Dr. Goldberg additionally noted that Claimant had "intrinsic elbow problems."

I find that Dr. Foster's deposed testimony and evaluation must be given significant weight. Dr. Foster reviewed Claimant's medical history; analyzed medical records of eight physicians who treated Claimant from 1992 until 2002; and performed his own physical examination of Claimant. He also reviewed the surgical procedures performed on Claimant following his injury. Dr. Foster's opinions are thorough and well-reasoned. Further, Dr. Foster has respectable credentials and demonstrated a working knowledge not only of Claimant's medical conditions, but also of Claimant's working conditions, given Dr. Foster's background in the military and its aircraft. (EX-21, at 215-18). Director has offered nothing other than a blanket statement that Employer failed to prove this particular element. Based on the evidence offered by Employer, I find that Employer has proven that Claimant's pre-existing disability contributed to his work-related injury, and without the pre-existing disability, Claimant's work-related injury would not have resulted in his current disability.

5. Disability is Materially and Substantially Greater than from Subsequent Injury Alone

Finally, the statute requires that, in cases where a permanent partial disability results, the employer must prove that "such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone . . . ." 33 U.S.C. § 908(f)(1) (2002). To this extent, a "'heavier burden'" is placed upon employers in permanent partial disability cases than in the case of a totally disabled employee. *Director, OWCP v. Bath Iron Works Corp.*, 129 F.3d 45, 51 (1st Cir. 1997). To satisfy this additional requirement,

> [T]he employer must show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work-related injury alone. A showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone. In other words, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury. Once the employer establishes the level of disability in the absence of a pre-existing permanent partial disability, an adjudicative body will have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater.

Id. (quoting *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 8 F.3d 175, 185-86 (4th Cir. 1993)). The First Circuit went on to note that "an employer is required to show the degree of disability attributable to the work-related injury, so that this amount may be compared to the total percentage of the partial disability for which coverage under the LHWCA is sought." *Id*.

Employer argues that the record establishes that Claimant's pre-existing disabilities combined with his work-related injury and rendered him permanently, partially disabled to a greater degree than the work-related injury alone would have. (Empl. Post-Hr'g Br., at 5). To support this argument, Employer offers the expert opinion of Dr. John Foster, a Board Certified

Orthopedist. (Empl. Post-Hr'g Br., at 4). According to Dr. Foster, twenty percent of Claimant's current problems relate to Claimant's previous injuries to his right elbow, and eighty percent relate to the work-related injury Claimant suffered on August 14, 1995. (Empl. Post-Hr'g Br., at 5-6). Dr. Foster testified at his deposition that Claimant's disability "is materially and substantially greater because of his pre-existing right elbow pathology than would have been the case in the absence of this pre-existing disability." (Empl. Post-Hr'g Br., at 6). Dr. Foster also testified that Claimant's employability was lessened when the pre-existing disability was combined with industrial injury problems. (Empl. Post-Hr'g Br., at 6).

Director asserts that Employer has presented no evidence to show that Claimant's pre-existing disability contributed to Claimant's permanent partial disability. (Dir. Post-Hr'g Br., at 4). Director contends that Employer's failure to submit evidence as to what Claimant's wage loss would be without the pre-existing condition is also fatal to its case. (Dir. Br. Mot. Dismiss, at 9).

Director's argument that Employer's failure to provide information regarding Claimant's loss of wage-earning capacity is a fatal flaw as to this element is rejected. While such evidence could possibly be helpful in establishing this element, is not required. Instead, I find that Employer has provided sufficient quantification by way of Dr. Foster's evaluation and deposition testimony. Dr. Foster apportioned eighty percent of Claimant's disability to his work-related injury on August 14, 1995, and twenty percent to his pre-existing disabilities. Again, Dr. Foster reached these conclusions based upon a thorough review of Claimant's medical history and records, as well as his own physical examination of the Claimant. I find considerable value in Dr. Foster's opinion that Claimant's prior elbow pathology materially and substantially increased Claimant's disability above what Claimant would have suffered without the prior disability. Further, drawing on the causation aspect, discussed above, I find that Claimant's disability is materially and substantially greater than it otherwise would have been in the absence of Claimant's pre-existing disability. Claimant had intrinsic elbow problems, and without these pre-existing problems, Claimant would not currently suffer from his permanent partial disability to the degree and extent that he is.

In conclusion, I find that the Employer is entitled to relief under §8(f) of the Act.

ORDER

Accordingly, it is hereby ordered that:

1. Employer, McDonnell Douglas/Boeing shall pay compensation in accordance with the July 2, 2003, Decision and Order on Reconsideration.

2. Employer, McDonnell Douglas/Boeing is entitled to Special Fund relief under 33 U.S.C. § 908(f) of the Act upon the expiration of 104 weeks from February 7, 1997.

3. Thereafter, compensation and adjustments shall be paid by the Special Fund established pursuant to the provisions of 33 U.S.C. § 944.

A

RICHARD E. HUDDLESTON
Administrative Law Judge